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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	Supreme Court No. R-21-0022
PETITION TO AMEND RULES)	
6.1, 7.2, and 7.4,)	SUPPLEMENT TO THE PETITION
ARIZONA RULES OF CRIMINAL)	
PROCEDURE)	
_____)	

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully requests this Court to permit substitution of the rule changes to Rules 6.1, 7.2, and 7.4, of the Rules of Criminal Procedure proposed in Appendix A for the rule changes proposed in Appendix A of the original petition.

This request is made in response to comments filed to date and received following discussion of this petition at meetings of court committees. These comments revealed issues with some of the proposed changes that should be addressed through meetings with judges and criminal justice system stakeholders rather than this rulemaking process. The aim of these meetings will be to identify where changes in current rules and practices can be made that will be efficient and

effective in achieving the desired goal of eliminating unnecessary pretrial detention due to inability to pay secured and cash bonds. The petitioner will form a work group to accomplish this.

I. Background and Purpose of the Revised Proposed Rule Amendments.

The remaining proposed rule changes promote the Task Force for Fair Justice for All recommended “best practices for making release decisions that protect the public, but do not keep people in jail solely for the inability to pay bail” contained in the Task Force [report](#). National and local statistics reviewed by the Task Force indicated a significant number of people incarcerated pretrial were there *solely* because they cannot afford to pay a bond. Research shows that “detaining low-risk and moderate-risk defendants, even for a few days strongly correlates with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low-risk and moderate-risk defendants also increases significantly.”¹ As the Task Force learned, unsecured bonds are equally effective as bonds secured by payment of money in incentivizing people to meet their appearance obligations.

In response to Task Force recommendations, rule amendments were

¹ *Justice for All: Report and Recommendation of the Task Force on Fair Justice for All* (Arizona Supreme Court, August 16, 2016) at p. 27, available at: <http://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf>

proposed in petition R-16-0041 that directed judges to make an individualized determination of a defendant's risk of non-appearance, risk to the safety of the community, and ability to pay a bond. The amendments also prohibited use of a bond schedule that called for a set bond amount based on the charge or some other factor. The amendments adopted by this Court moved Arizona's criminal justice system away from reliance upon money bail and toward conditional release based on an individualized assessment of a defendant's risk profile.² The rule amendments proposed by this petition are designed to take further steps in this direction by authorizing a new representation option at the initial appearance and at the later review of bond and other conditions of release by the court when the defendant is unable to make bond due to the defendant's financial condition.

II. Proposed Rule Changes

Rule 6.1(f)

As the Fair Justice Commission determined, whether a defendant is released or detained pending determination of guilt is a critical decision for the defendant and for our society.

Even short pretrial stays of 72 hours in jail have been shown in national and a local Arizona study to increase the likelihood of recidivism. Pretrial incarceration can cause real harm, such as loss of employment, economic hardship, interruption of education or training, and impairment of health or injury because of neglected medical issues.³

² Ibid 28-29

³ Ibid 27

The proposed addition of Rule 6.1(f) would provide the option for all detainees to retain a legal paraprofessional (LP) authorized by Supreme Court Rule 31.3(e)(4) and ACJA § 7-210 to provide representation in all misdemeanor cases tried in justice and municipal courts when incarceration is not an option and in felony cases for the initial appearance and subsequent bail proceedings. This authorization anticipates eventual licensing of legal paraprofessionals with a Limited Jurisdiction Criminal practice area under new Arizona Code of Judicial Administration (ACJA) provisions. This does not affect the current Rule 6.1(b)(1)(B) requirement that the court appoint an attorney for an indigent defendant “for the limited purpose of determining release conditions at or following the initial appearance, if the defendant is detained after a misdemeanor charge is filed.” A charge must be filed within 48 hours after the initial appearance, excluding weekends and holidays.

Rule 7.2 Technical Amendments

Rule 7.2(a)(2) Clarifies the meaning and conforms this provision to the reasonable and necessary standard required by 7.3(a).

Rule 7.2(a)(3) Conforms terminology and language to that used in Rule 7.3 and the statute referenced.

Rule 7.4(c)

A key element of the process due defendants detained on bonds they cannot

afford is a proceeding at which the parties may make recommendations and arguments on the issue of the reasonableness and necessity of a cash or secured bond. The proposed amendment to 7.4(c) provides that, on motion of a party or on its own, the court may determine the conditions of release under the rules and statutes in the additional circumstance that “the defendant is unable to post bond due to the defendant’s financial condition.” The proposed amendment to Rule 7.4(f) recognizes that the determination of conditions of release for this reason need be made only once.

III. Distribution for Comment.

The rule amendments described above and contained in Appendix A are significantly different from those submitted in Appendix A of the original petition. Therefore, petitioner requests that this Supplement to the Petition with these proposed rule amendments be posted for comment for 30 days and a seven-day period for reply.

Wherefore, petitioner respectfully requests that the Court amend the Rules of Criminal Procedure as proposed in the Appendix included herewith.

RESPECTFULLY SUBMITTED this 26th day of May, 2021.

By /S/
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APPENDIX

(language to be removed is shown in ~~striketrough~~, new language is underlined)

Rule 6.1 Right to Counsel; ~~Right to a Court-Appointed~~ Appointment of an Attorney; Waiver of the Right to Counsel; Authority of a Legal Paraprofessional

(a) Right to Be Represented by Counsel. A defendant has the right to be represented by counsel in any criminal proceeding. The right to be represented by counsel includes the right to consult privately with counsel, or the counsel's agent, as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow counsel to adequately prepare for the proceeding.

(b) ~~Right to a Court-Appointed~~ Appointment of an Attorney.

(1) *As of Right.* An indigent defendant is entitled to a court-appointed attorney:

(A) in any criminal proceeding that may result in punishment involving a loss of liberty; or

(B) for the limited purpose of determining release conditions at or following the initial appearance, if the defendant is detained after a misdemeanor charge is filed.

(2) *Discretionary.* In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.

~~(3) *Definition of "Indigent."* For the purposes of this rule, "indigent" means a person who is not financially able to retain counsel.~~

(c) Waiver of Right to Counsel. A defendant may waive the right to counsel if the waiver is in writing and if the court finds that the defendant's

waiver is knowing, intelligent, and voluntary. After a defendant waives the right to counsel, the court may appoint advisory counsel for the defendant at any stage of the proceedings. In all further matters, the court must give advisory counsel the same notice that is given to the defendant.

(d) Unreasonable Delay in Retaining Counsel. If a defendant appears at a proceeding without counsel, the court may proceed if:

- (1) the defendant is indigent and has refused appointed counsel; or
- (2) the defendant is not indigent and has had a reasonable opportunity to obtain counsel.

(e) Withdrawal of Waiver. A defendant may withdraw a waiver of the right to counsel at any time. But the fact that counsel is later appointed or retained does not alone establish a basis for repeating any proceeding previously held or waived.

(f) Right to Be Represented by a Legal Paraprofessional. A defendant has a right to be represented by a legal paraprofessional in criminal cases and proceedings as provided in ACJA § 7-210. This does not affect the right to appointment of an attorney under (b)(1)(B). A legal paraprofessional shall be permitted to consult privately with the defendant as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow a legal paraprofessional to adequately prepare for the proceeding. A legal paraprofessional shall comply with all duties in 6.3(a), (c), and (d).

(g) Definition of Indigency. For the purposes of this rule, “indigent” means a person who is not financially able to retain counsel.

Rule 7.2 Right to Release

(a) Before Conviction; Bailable Offenses.

(1) *Presumption of Innocence.* A defendant charged with a crime but not yet convicted is presumed to be innocent.

(2) *Right to Release.* Except as these rules otherwise provide, any defendant charged with an offense bailable as a matter of right must be released pending and during trial on the defendant's own recognizance with only the mandatory conditions of release required under Rule 7.3(a).~~This rule does not apply if the court determines that such a release will not reasonably~~ unless the court determines that additional conditions are reasonable and necessary to assure the defendant's appearance or protect the victim, any other person, or the community from risk of harm by the defendant. If the court makes such a determination, it must impose the least onerous conditions of release set forth in Rule 7.3(c).

(3) *Determining Method of Release or Bail Bond Amount.* In determining the method of release or the a bond amount ~~of bail~~, the court must ~~consider~~ take into account all of the factors set forth in A.R.S. § 13-3967(B).

(b) through (d) [no change]

Rule 7.4 Procedure

(a) and (b) [no change]

(c) Later Review of Conditions.

(1) *Generally.* On motion or on its own, a court may reexamine bail eligibility or the conditions of release if the case is transferred to a different court, ~~or~~ if a motion alleges the existence of material facts not previously presented to the court, or, if not previously raised under this provision, the defendant is unable to post bond due to the defendant's financial condition.

(2) *Motion Requirements and Hearing.* The court may modify the conditions of release only after giving the parties an opportunity to respond to the proposed modification. A motion to reexamine the conditions of release must comply with victims' rights requirements provided in Rule 39.

(3) *Eligibility for Bail.* If the motion is by the State and involves a defendant previously held eligible for bail at the initial appearance, it need not allege new material facts. The court must hold a hearing on the record as soon as practicable, but no later than 7 days after the motion's filing.

(d) through (g) [no change]